

I7QKMALC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 DIEGO ENRICO MALTA,

4 Plaintiff,

5 v.

17 CV 3238 (JFK)

6 FOX HORAN & CAMERINI LLP,
7 et al.,

8 Defendants.

-----x

9 New York, N.Y.

10 July 26, 2018

11:18 a.m.

11 Before:

12 HON. JOHN F. KEENAN,

13 District Judge

14 APPEARANCES

15 CATAFAGO FINI LLP
16 Attorneys for Plaintiff
BY: JACQUES CATAFAGO

17 PETER M. LEVINE
18 Attorney for Defendants and Third-Party Plaintiffs

19 CATAFAGO FINI LLP
20 Attorneys for Third-Party Defendants
BY: ADAM BRAD SHERMAN

I7QKMALC

(Case called)

THE COURT: What we have here before us today is a motion to dismiss the third-party complaint. The motion is being brought by the third-party defendants. We are going to have first argument, so it's going to be -- my appearance doesn't make quite clear to me who is the third-party defendants' lawyer.

MR. SHERMAN: I am, your Honor. Adam Sherman.

THE COURT: Okay. I'll hear you, Mr. Sherman. You're the movant, right?

MR. SHERMAN: Yes.

THE COURT: Okay. Go to the lectern. Yes, go ahead.

MR. SHERMAN: Okay, your Honor.

In this action, I represent myself and my client, Robert Malta. I'll begin with the statement that I understand that the counsel for the defendants, Peter --

THE COURT: You're appearing pro se, as it were?

MR. SHERMAN: Yes. Yes, your Honor.

THE COURT: Okay, fine.

MR. SHERMAN: I'll begin by saying that I understand counsel for the defendants, Peter Levine, has a job to do, he has a job to protect his client zealously, but this third-party complaint is, frankly, inappropriate.

THE COURT: When you say it's inappropriate, doesn't the good-faith requirement of the New York General Obligations

I7QKMALC

1 Law -- I think it's 15-08 -- 15-108 really -- doesn't that
2 apply to both the stipulation in the state action and the
3 March 2018 releases between Diego Robert and yourself?

4 MR. SHERMAN: Well, in the defendants' moving papers,
5 they advance different arguments for me and different arguments
6 for Robert Malta. Beginning with myself, they do not argue the
7 good-faith requirement of 15-108. Instead, they advance an
8 argument that the statute itself does not apply to me.

9 Beginning with that, their premise for that argument
10 is that the 3217 stipulation, which discontinued the state
11 court action, which did not mention me, which plaintiff never
12 sued me, precludes the applicability of GOL 15-108. There's no
13 case that has ever held such a proposition.

14 Plainly -- and as a broader statement, for both
15 third-party defendants, there's no financial success that's
16 possible, even if what they're saying is true, because of GOL
17 15-108(a), which entitles the defendants, to the extent that
18 the viability of what they're saying is going to be a setoff at
19 trial, so there will be no reason to seek contribution because
20 the plaintiff will have the reduced recovery.

21 But regarding me, the crux of their argument is that
22 the statute doesn't apply.

23 THE COURT: Does that answer my question whether the
24 good-faith requirement applies to both the stipulation and to
25 the relief?

I7QKMALC

1 MR. SHERMAN: It does apply to both, yes. Yes, your
2 Honor.

3 THE COURT: Now, as I understand your argument and
4 your papers, you're saying that the conclusory allegations of
5 bad faith relative to the delivery of the release won't survive
6 a motion to dismiss, right?

7 MR. SHERMAN: Yes.

8 THE COURT: So I'm asking you this now: Aren't those
9 allegations, that Diego and Robert entered into the stipulation
10 in state court as part of a scheme to -- and I'm using the
11 quote now -- "impose on the defendants Diego's professed
12 obligation to pay an alleged gift tax," isn't that enough to
13 show that Diego and Robert cooperated improperly to extract
14 from the defendants more than their equitable share of damages?
15 And doesn't that create an issue for the fact-finder? And if
16 that's all so, how do I grant the motion?

17 MR. SHERMAN: The keywords -- the answer to that is,
18 no, it doesn't because of the last part of your statement, to
19 extract more than the fair share of equitable damages. That is
20 an impossibility here because of the setoff provision of
21 15-108(a). That will never happen.

22 THE COURT: All right. Go ahead. I cut you off a few
23 times.

24 MR. SHERMAN: So, moving next to Robert Malta, the
25 crux of their good-faith argument, as the defendants only

I7QKMALC

1 assert that regarding Robert Malta, that a declaration
2 submitted in opposition to the motions to dismiss in this case,
3 which was properly denied, they allege that Robert Malta
4 committed perjury in that declaration. However, a review of
5 that declaration makes it very clear that it's completely
6 consistent with the allegations that they never -- the
7 defendants never explained the tax consequences of his gift to
8 Robert Malta. They allege that a mere telephone call sometime
9 in February, that there may be gift taxes somewhere in the
10 future if transfers exceeded a certain threshold amount. That
11 is not an explanation. That's simply a vague statement that
12 Robert Malta, who is not an attorney, not a CPA, could not have
13 understood.

14 Simply to say that they've made -- basically on the
15 eve to amend pleadings, they have reformatized this idea based
16 on the evidence that I submitted, including the Special Master
17 Daniel Capra's report, which basically said that there is a
18 high bar to prove, to even assert, any type of good faith
19 argument. And they've tried to surround a declaration that's
20 simply perjurious and say that he committed perjury. When you
21 look at the declaration and the third-party complaint, it's
22 clearly not.

23 THE COURT: About the fact that the defendants here
24 were not parties to the state action -- they weren't parties,
25 right?

I7QKMALC

1 MR. SHERMAN: Right.

2 THE COURT: Okay. Now, if they weren't parties, how
3 is there res~judicata? How does it bar their claims here?

4 MR. SHERMAN: I'm sorry, I don't understand the
5 question. Are you saying --

6 THE COURT: Well, the defendants here were not parties
7 to the state action, right?

8 MR. SHERMAN: Right.

9 THE COURT: So how is that res~judicata? How is it
10 that res~judicata bars their claims for contribution here?

11 MR. SHERMAN: Because the plaintiff released Robert
12 Malta by virtue of the 133217 stipulation that operates as a
13 release. And now, since it operates as a release -- and, also,
14 as a side matter, that underlying case dealt with different
15 damages. The plaintiff was seeking to void the agreement. If
16 the agreement is voided, there's no tax consequences. Here,
17 the agreement can't be voided. So there would be the flowing
18 tax consequences.

19 But as a threshold issue, the plaintiff settled his
20 claim with Robert Malta as a release, not as a judgment as to
21 liability, which is why 15-108(d) applies.

22 THE COURT: What else do you have?

23 MR. SHERMAN: Nothing further, your Honor.

24 THE COURT: All right. Thank you.

25 Who is going to argue next?

I7QKMALC

1 MR. CATAFAGO: Your Honor, may I speak for the
2 plaintiff?

3 THE COURT: For the plaintiff or the third party?

4 MR. CATAFAGO: For the plaintiff.

5 THE COURT: I'm not sure what you have to do with the
6 motion, but, all right, go ahead.

7 MR. CATAFAGO: I appreciate it.

8 THE COURT: Identify yourself for the record.

9 MR. CATAFAGO: So, Judge, I'm --

10 THE COURT: You represent Diego, right?

11 MR. CATAFAGO: Yes, your Honor.

12 THE COURT: Okay.

13 MR. CATAFAGO: So, yesterday, your Honor, we concluded
14 the third of the three party defendants' deposition, Andy
15 Shore. He is a tax guy, and he followed the other individual
16 defendants who were photographed on June 13th and 15th. And we
17 asked specifically what proof, what evidence do you have of
18 anything about a scheme, a premeditated scheme in settling the
19 state court action, and his response is: I don't know, I don't
20 know.

21 So, Judge, if you look at Iqbal and the line from the
22 Second Circuit in this court, very clearly, you can't just
23 claim conspiracy, you can't just claim a scheme, without facts.
24 The only fact that they put in, as Attorney Sherman said, is
25 after the fact, they amended to claim some kind of, quote,

I7QKMALC

1 perjury in the successful opposition to the motion to dismiss
2 this action. So when Mr. Robert Malta said they never
3 explained to me the draconian effects of the tax consequences,
4 is that his opinion or is that perjury? Is that enough to show
5 a scheme or bad faith? As a matter of law, it's not. And if
6 you look at the depositions of June 13, 15, and July 25th and
7 all of the documents they produced under Rule 34, there is not
8 one shred of evidence, starting with the retainer agreement,
9 showing that they ever explained the tax consequences, either
10 to Robert Malta or to Diego Malta.

11 Now, I get it, Judge, this is a Rule 3211, this is
12 outside the pleadings, but they have opened the door when they
13 started talking about my office, and Adam Sherman's office, and
14 all this side --

15 THE COURT: Well, you're not really a party.

16 MR. CATAFAGO: I'm not a party.

17 THE COURT: So I'm sort of doing you a favor
18 permitting you to argue on this one.

19 MR. CATAFAGO: I appreciate it. But I will tell you,
20 Judge, in 34 years, I've never seen the good-faith language of
21 15-108 applied the way the third-party plaintiffs seek to apply
22 it. This is a first. And when you couple it with Iqbal and
23 the standards of Iqbal, it fails.

24 Thank you.

25 THE COURT: Okay. Thank you.

I7QKMALC

1 Mr. Levine, you are a party?

2 MR. LEVINE: I am.

3 THE COURT: You're the third-party plaintiff and the
4 defendant in the main action. Okay, go ahead.

5 MR. LEVINE: In the reply memorandum, the third-party
6 defendants abandoned their argument that the issue of good
7 faith need not be considered when deciding the effect of a
8 release under General Obligations Law 15-108. They agree with
9 us that good faith is a requirement under the statute. And
10 they agree that perjury is an indication of bad faith that can
11 take a release out of the statute. They cite a case right on
12 point.

13 They dispute, however, that Robert Malta committed
14 perjury. And to prove this, they parse the words of his
15 declaration, and they parse the words of the text of the
16 amended third-party complaint, and they come to the factual
17 conclusion, no, there was no perjury. That's just an issue of
18 fact for the jury.

19 THE COURT: Well, let me ask you something about this
20 release here. As I understand the statute, 15-108(b) reads --
21 and I'm reading the statute, "A release given in good faith by
22 the injured person to one tortfeasor as provided in (a)
23 relieves him" -- that means that one tortfeasor -- "from
24 liability to any other person for contribution as provided in
25 Article XIV of the Civil Practice Law & Rules."

I7QKMALC

1 That's the law. Aren't the defendants' contribution
2 claims against Robert and Sherman clearly barred?

3 MR. LEVINE: No.

4 THE COURT: Why not?

5 MR. LEVINE: First, as to Sherman, that stipulation of
6 discontinuance does not mention him at all. And the 15-108
7 says the releasee must be explicitly and clearly stated. And
8 they don't even pretend that Adam Sherman is mentioned in that
9 stipulation of discontinuance.

10 And they have then abandoned their ipso facto argument
11 that because the principal, the client, Robert Malta, was
12 released, therefore, the attorney Adam Sherman was released.
13 No, that's not the law. You have to say who's released, and
14 Adam Sherman, who was not a party in that state court
15 litigation, is not at all mentioned in that stipulation, and,
16 therefore, it does not effect a release against him.

17 As to Robert, that stipulation --

18 THE COURT: Wait a minute, now. If that's all so,
19 what does the clause in the statute mean?

20 MR. LEVINE: Which clause, your Honor?

21 THE COURT: "Any other person from contribution."
22 What does that mean?

23 MR. LEVINE: It means --

24 THE COURT: It relieves him from liability to any
25 other person from contribution.

I7QKMALC

1 MR. LEVINE: Right, who is liable or claimed to be
2 liable.

3 But you have to look at the entire statute. It's one
4 unified rule. All elements of the statute must be complied
5 with. It says, in (a), "When a release or covenant not to sue
6 is given to one or more persons liable or claimed to be liable,
7 it does not discharge any of the other tortfeasors from
8 liability unless its terms expressly so provide." And the
9 stipulation did not expressly provide for a release of Adam
10 Sherman. So that stipulation doesn't help him.

11 As to Robert Malta, it doesn't help him because Diego
12 Malta, his brother, did not deliver that stipulation in good
13 faith. And the amended third-party complaint alleges
14 sufficient facts to allow reasonable jurors to conclude Diego
15 Malta was not acting in good faith. This action was commenced
16 one month after the stipulation was filed in the state court
17 action. Diego Malta is represented by the same attorney who
18 represented Robert Malta in the state court action,
19 Mr. Catafago.

20 Robert Malta submits a perjurious affidavit in
21 opposition to this motion, to the motion to dismiss. Robert
22 Malta voluntarily stepped into this case. He is an interloper.
23 Now he is shocked and shocked about the accusation of
24 collusion. He says, in the reply memo, oh, I submitted this
25 perjurious affidavit because I was defamed by the motion to

I7QKMALC

1 dismiss. No, he wasn't defamed. All we did was quote his
2 brother. We quoted Diego's state court complaint regarding
3 Robert Malta's conduct, how Robert Malta and Adam Sherman,
4 according to Diego, duped Diego into signing that gift
5 agreement while he was drunk and high on Xanax. We didn't make
6 that up. Those are Diego's own words, through his attorney, in
7 the state court action.

8 THE COURT: Now, under the statute, the plaintiff will
9 have a reduced taking; that is, the plaintiff, he is going to
10 have a reduced recovery based on the amount of the third-party
11 defendants' liability.

12 MR. LEVINE: Correct.

13 THE COURT: All right.

14 Now, why is this contribution claim, then, necessary
15 when the defendants' liability will be limited to their fair
16 share of the damages?

17 MR. LEVINE: Because the Fox Horan Defendants should
18 not be left pointing to an empty chair at trial. Everybody
19 allegedly responsible should be in the courtroom in front of
20 the jury. The issue here is not prejudice. The issue is
21 whether the stipulation of discontinuance, by its terms, covers
22 Adam Sherman. It does not. The issue is whether the
23 stipulation delivered to Robert Malta was delivered in good
24 faith. It was not. The issue is whether the postjudgment
25 delivery of a release extinguishes a claim for contribution.

I7QKMALC

1 It does not.

2 There is a judgment in the state court action. There
3 was a settlement with Robert only. Both the Fox Horan
4 Defendants and Adam Sherman were identified as tortfeasors in
5 that state court complaint. It is not necessary for them to
6 have been named as defendants for General Obligations Law
7 15-108 to cover the disposition of the contribution claim.

8 As your Honor pointed out, if you look at the statute,
9 15-108 does not refer to plaintiffs, or defendants, or to
10 parties in a case, it refers to persons liable or claimed to be
11 liable. It refers to the releasor, it refers not to asserted
12 claims. Likewise, Article XIV of the CPLR, which governs
13 claims for contribution, refers to two or more persons who are
14 subject to liability for damages for the same personal injury,
15 for the same injury, have a claim for contribution. You do not
16 need a lawsuit in order to have a claim for contribution.

17 In fact, in CPLR --

18 THE COURT: Well, if you don't have a lawsuit, how do
19 you enforce your claim?

20 MR. LEVINE: Excuse me?

21 THE COURT: If you don't have a lawsuit, how do you
22 enforce your claim?

23 MR. LEVINE: It's interesting. One of the cases cited
24 by the third-party defendants answers your question, your
25 Honor. Makeun versus State 471 N.Y.S.2d 293. It's interesting

I7QKMALC

1 to look at the facts of that case. There, a plaintiff
2 passenger sues a landowner in Supreme Court for creating a
3 hazardous condition that caused the car crash.

4 THE COURT: A car crash?

5 MR. LEVINE: Yes. The car crashes, I think, into a
6 tree, and the passenger sues the owner of the land on which the
7 tree --

8 THE COURT: The landowner?

9 MR. LEVINE: Sues the landowner, yes.

10 The landowner brings a third-party action against the
11 driver, who is the passenger's sister. Prior -- prior, this is
12 key -- prior to the entry of judgment, the plaintiff gives a
13 release to the landowner in exchange for cash, full settlement.
14 The landowner then brings a separate action in the Court of
15 Claims against the State of New York, alleging that the state
16 did not properly maintain the road. Now, the state was not a
17 party in that Supreme Court action, and could not have been a
18 party in that Supreme Court action. You could only sue the
19 state in the Court of Claims. But there was no extant claim
20 against the state.

21 Can the landowner seek contribution from the state?
22 No. Even though the State of New York was not a party, the
23 prejudgment settlement extinguished the contribution rights.
24 15-108 will apply whether there is a lawsuit or not. And
25 that's the same holding that Judge Werker in this court,

I7QKMALC

1 Westwood Chemical Company versus --

2 THE COURT: That's 35 years ago. Judge Werker's case
3 was 35 years ago.

4 MR. LEVINE: Correct, 1983. Exactly, your Honor.
5 Westwood Chemical Company versus Kulick, 570 F.Supp 1032.

6 In that case, an employer sued two former employees,
7 saying that the employees had lured -- had brought about a
8 termination of an exclusive sales representation agreement and
9 lured the client away for themselves. Prior, prior, to the
10 commencement of any litigation, the employer settled with the
11 client and delivered a release. There is then a lawsuit and a
12 trial against the employees. They're found liable for taking
13 the client, but they cite the General Obligations Law 15-108
14 and say any amount paid by the client has to be given as a
15 credit against our liability. Judge Werker agreed with them.

16 Here, we have a much different situation. It's
17 similar in that neither Fox Horan, nor Adam Sherman were
18 parties in the state court litigation, but the significant
19 difference is, there is a judgment in that state court
20 litigation. There is a stipulation of discontinuance with
21 prejudice that indisputably effects an adjudication on the
22 merits. We have a judgment. And what does that judgment say?
23 Robert Malta is zero percent liable. That means everybody else
24 is 100 percent liable. But those contribution claims were not
25 extinguished by the judgment, they survived. And now you have

I7QKMALC

1 a postjudgment settlement with Adam Sherman. Diego Malta gives
2 him, how conveniently, a year later after this lawsuit is
3 commenced, a release. But it doesn't do him any good. It's a
4 postjudgment settlement. 15-108 will govern here. And the law
5 is clear that you do not change judgments.

6 So the release does not preclude a claim for
7 contribution against Adam Sherman.

8 THE COURT: Okay. Are you finished your argument now?
9 You've had 20 minutes.

10 MR. LEVINE: Okay. Thank you, your Honor.

11 THE COURT: Okay. Are you finished? I said --

12 MR. LEVINE: Am I finished? I'm sorry, no, just --

13 THE COURT: You don't have to be sorry, just wrap it
14 up.

15 MR. LEVINE: Yes, certainly.

16 As for res~judicata, we make it -- this is one other
17 point about whether people are parties and whether 15-108 will
18 apply: We cite two cases, Chase Manhattan Bank versus Akin
19 Gump. I direct your Honor's attention to 763 N.Y.S.2d at 593,
20 in which the First Department said 15-108 defines "the effect
21 of a settlement would have on each potential claim not disposed
22 of by the terms of the settlement agreement." So 15-108 will
23 apply to those potential claims against Adam Sherman and the
24 Fox Horan Defendants that were identified in Diego Malta's
25 state court complaint.

I7QKMALC

1 The New York Court of Appeals in Rock versus Reed
2 Prentice, I direct your Honor's attention to 382 N.Y.S.2d at
3 723. The purpose of 15-108, says the Court of Appeals, is "to
4 promote settlements in multiparty tort cases by clearly
5 defining the effect the settlement will have on collateral
6 rights and liabilities in future litigation." It doesn't have
7 to be pending or present litigation.

8 As for res~judicata, which your Honor asked
9 Mr. Sherman about: Clearly, there is absolutely no privity
10 between any of the parties in the state court action and any of
11 the Fox Horan Defendants. That judgment cannot at all bind Fox
12 Horan. And as we say in a footnote in the answering
13 memorandum, what's good for the goose or what's sauce for the
14 goose is also sauce for the gander. If our claim of
15 contribution is wiped out, then certainly the main claim
16 against the Fox Horan Defendants gets wiped out, too, by that
17 judgment. And, clearly, that's not what the third-party
18 defendants are arguing. So res~judicata doesn't apply.

19 THE COURT: Okay.

20 MR. LEVINE: Thank you.

21 THE COURT: Mr. Sherman?

22 MR. SHERMAN: Your Honor, there is a fundamental
23 misunderstanding brought by the defendants' arguments. Rock --
24 let me begin with Rock versus Reed practice. First of all,
25 that dealt with GOL 15-108(c), which is a settlement.

I7QKMALC

1 15-108(c) provides that if a tortfeasor was attained, his own
2 release from liability shall not --

3 THE COURT: Slower. The court reporter won all the
4 awards as the fastest in the nation, but he only has ten
5 fingers. Go a little slower and start with what you're saying
6 again.

7 MR. SHERMAN: Sorry. Reed practice applied GOL
8 15-108(c). That subsection applies to a tortfeasor that has
9 got its release from its own liability. The defendants do not
10 have such a release. It's completely off base, as opposed to
11 what's happening here.

12 Another thing that's explicitly absent from their
13 argument is that they say, you've heard about three or four
14 times, the 3217 stipulation did not mention me. What was
15 explicitly absent from that is that before the defendants
16 asserted this claim against me, the plaintiff released me.
17 They don't deal with that. And they should check their papers
18 because they explicitly say that their only bar for a
19 contribution claim against me is that GOL 15-108 doesn't apply.
20 That's their argument.

21 And they've readily admitted that 15-108(a) is a
22 setoff, which means that there's no financial chance for
23 success here. And, yet, they also make the claim that because
24 Robert Malta was released, that somehow 100 percent of the
25 liability -- but that's not what the statute says. The statute

I7QKMALC

1 says -- 15-108(a) says it's whatever is greater is the setoff
2 at a trial. To the extent that a jury could find Robert Malta
3 liable for any of the damages, it would be the percentage that
4 the jury decides, not the release.

5 THE COURT: Now, let me ask you something because
6 nobody mentioned it so far, and I will mention it.

7 MR. SHERMAN: Sure.

8 THE COURT: As I understand it, in the defendants'
9 claim in the third-party complaint, there's an application for
10 sanctions, isn't there?

11 MR. SHERMAN: Yes.

12 THE COURT: Against you, right?

13 MR. SHERMAN: No. I'm --

14 THE COURT: You're claiming -- I'm sorry, I've got it
15 backwards. All right. How am I going to sanction them?

16 MR. SHERMAN: Because there's no -- first of all, I
17 didn't want to do that.

18 THE COURT: You didn't want to, but you did.

19 MR. SHERMAN: Because I'm terribly offended by this
20 pleading, and they've had multiple chances to withdraw. And
21 there's no chance for success here, and they've admitted that
22 up here. And, by the way, the claim about the empty chair was
23 expressly disclaimed in the report, which I attached to my
24 brief by Daniel Capra, which was adapted by the Honorable Judge
25 Jed Rakoff, that the claim of the empty chair was not a valid

I7QKMALC

1 reason to assert a contribution claim against two released
2 parties.

3 THE COURT: That's something you'd like to argue,
4 particularly when there's going to be a jury trial.

5 MR. SHERMAN: That is the law of the court, your
6 Honor.

7 The only reason why I asked for sanctions is because,
8 simply put, he was advised of the releases, he was advised that
9 there is no financial claim, there's no financial chance of
10 success here. He ignored all those chances to withdraw, and,
11 instead, they reformulated this perjury theory, which makes no
12 sense, on the eve of the deadline to amend pleadings. So
13 that's the reason, your Honor.

14 They haven't cited one -- and I'd like to further, the
15 Chase Manhattan case is another complete misapplication of GOL
16 108. The reason why GOL 108 did not preclude contribution is
17 because Chase had settled its claim. Here, the defendants have
18 not settled their claim. That is a huge difference because
19 Chase was not entitled to 15-108(a)'s set-off provision.
20 That's why, because they wouldn't be faced -- in that scenario,
21 they would be faced with more than their fair share of
22 equitable damages, something that is impossible to happen here.

23 THE COURT: All right. Are you finished?

24 MR. SHERMAN: Yes.

25 THE COURT: Okay. Thank you very much. I'm going to

I7QKMALC

1 reserve decision. We are in recess.

2 MR. LEVINE: Thank you, your Honor.

3 * * *